UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BRINK'S U.S.[1]	)	
Employer	)	
and	)	Case No. 29-RC-11291
LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION	)	
Petitioner	)	

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Brink's U.S., herein called the Employer, is engaged in transporting, protecting and processing currencies and other valuables. Law Enforcement Employees Benevolent Association, herein called the Petitioner, filed a petition with the National Labor Relations Board, herein called the Board, under Section 9(c) of the National Labor Relations Act, herein called the Act, seeking to represent two bargaining units, consisting of: (1) all full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by the Employer at its 652 Kent Avenue, Brooklyn, New York facility, but excluding all other employees and supervisors as defined in the Act; and (2) all full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by the

[1] The name of the Employer appears as amended at the hearing.

Employer at its 481-495 New Jersey Railroad Avenue, Newark, New Jersey, facility, but excluding all other employees and supervisors as defined in the Act.

A hearing was held before Marcia Adams, Hearing Officer of the Board. Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

The Employer contends that the Petitioner is not a labor organization as defined in Section 2(5) of the Act, and that the Petitioner cannot be certified to represent guards under Section 9(b)(3) of the Act. The Petitioner takes the opposite position. The parties agreed on the appropriateness of the bargaining units sought.

Just one witness testified at the hearing: Kenneth N. Wynder, Jr., president of the Petitioner.

I have considered the evidence and the arguments presented by the parties. As discussed below, I have concluded that the Petitioner is a labor organization, and that it is not disqualified under Section 9(b)(3) from certification in a unit of guards. The facts and reasoning that support my conclusions are set forth below.

Petitioner's Labor Organization Status

Section 2(5) of the Act provides that, "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." It is not necessary to establish that these purposes have come to fruition if a labor organization meets the statutory definition. *Betances Health Unit*, 383 NLRB 369, 375 (1987); *Wackenhut Corp*., 223 NLRB 83, 85

(1976); *Comet Rice Mills Division Early California Industries Inc.*, 195 NLRB 671, 674 (1972); *see Butler Manufacturing Company*, 167 NLRB 308 (1967)(labor organization with the intent to represent employees if certified). A request for recognition as the collective bargaining agent for an employer's employees may evidence the requisite statutory purpose. *The East Dayton Tool & Die Company*, 194 NLRB 266 (1971). The necessary "participation of employees" may be demonstrated through such evidence as the signing of authorization cards, attendance at meetings, the formation of employee committees and the right to vote on all matters of importance, including the adoption of by-laws and the election of officers by secret ballot. *Michigan Bell Telephone Company*, 182 NLRB 632 (1970); *Alto Plastics Manufacturing Corporation*, 136 NLRB 850, 852 (1962).

In the instant case, the Petitioner was formed in late 2002. The Petitioner's constitution and by-laws indicate, in the preamble, that the Petitioner was "formed for private and public sector law enforcement employees in order to provide an employee association dedicated to protecting and preserving their interests and welfare, improving their working conditions, establishing and administering collective bargaining agreements with employers and guaranteeing the individual rights and legal protections of each member." The record reveals that the Petitioner's definition of "private law enforcement employees" is the same as the Act's definition of guards. Article II, "Purpose," sets forth objectives such as "to improve the wages, hours and conditions of work," "to establish and maintain collective bargaining agreements with employers for the purpose of representing members and in making and maintaining employment relationships and agreements covering discipline, benefits, rates of pay, rules and

working conditions for the members of the Association, and to settle promptly disputes and grievances which may arise between such members and their respective employers," and "to make provisions for suitable pension, annuity, retirement, disability benefits and insurance benefits for all members of the Association through negotiations with employers, legislation, collective bargaining and other means."

With regard to the participation of employees, the constitution and by-laws provide for members to vote for directors and officers of the Petitioner, and to ratify all collective bargaining agreements. Members are eligible to hold office, and are "invited and encouraged" to attend meetings.

In addition, the record indicates that employees have "participated" in the Petitioner by signing a sufficient number of authorization cards to establish a showing of interest in the two bargaining units sought. *See Michigan Bell*, 182 NLRB at 632. The petition indicates that the Petitioner requested recognition as bargaining representative, providing further evidence that the Petitioner exists for the purposes set forth in Section 2(5) of the Act. *See Butler Manufacturing Company*, 167 NLRB 308 (1967).

The Petitioner also provided evidence regarding its representation of the Environmental Police Officers ("EPOs") employed by the New York City Department of Environmental Preservation ("DEP"). The record reflects that on June 17, 2003, the Petitioner filed a petition with the New York City Office of Collective Bargaining Board of Certification ("OCB")[2] to represent the EPOs. On June 20, 2005, after a number of hearings, the OCB found the petitioned-for unit, consisting only of EPOs, to be

[2] The New York City Office of Collective Bargaining could not have asserted jurisdiction over the New York City Department of Environmental Protection ("DEP") if the DEP were a private entity. Thus, the Hearing Officer was correct in precluding the Employer from engaging in protracted cross-examination regarding the New York City Water Board, which may be related in some way to the DEP. See Brief of Employer at 5.

appropriate. On October 20, 2005, following an election, the Petitioner was certified by the OCB as the exclusive collective bargaining representative for the EPOs.

Previously, the EPOs were part of a larger unit represented by Local 300, Service Employees International Union, AFL-CIO ("Local 300"). On April 15, 2003, prior to the filing of the petition, the Petitioner contacted Local 300 by letter, to express its interest in representing the EPOs, in light of the fact that the "interests and needs of the DEP Police [were] simply not being met when they [were] forced to bargain as a group with non-law enforcement City employees." The letter expressed the hope that the matter could be worked out informally between the two unions, but it was rebuffed at that time, resulting in two years of litigation before the New York City Office of Collective Bargaining.

About a week after it was certified to represent the EPOs, the Petitioner met with the City of New York and commenced negotiations for a collective bargaining agreement. At that time, the Petitioner made a verbal proposal that the EPOs receive wages and benefits on a par with those of New York City Police Department employees.[3] The Petitioner is waiting for New York City to respond to this proposal.

Based on the above evidence, I have concluded that the Petitioner meets the definition of a labor organization set forth in Section 2(5) of the Act.

Section 9(b)(3) Issue

Section 9(b)(3) of the Act provides that "the Board shall not…decide that any unit is appropriate for [the purposes of collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other

[3] In its brief, the Employer refers to an affidavit dated January 30, 2006, contending that it contradicts Wynder's testimony regarding the current state of the negotiations. Brief of Employer at 4. Although the Employer's attorney read a portion of an affidavit ("paragraph 10") into the record, the record is not clear as to when the affidavit was signed, or whether paragraph 10 was part of an affidavit signed by Wynder.

persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

The noncertifiability of a guard union must be shown by "definitive evidence." *Burns Security Services*, 278 NLRB 565, 568 (1986).

Representation of Non-guards

Under Section 9(b)(3) of the Act, a union that represents non-guards working in the public sector is not disqualified from being certified as the representative of employees in a bargaining unit of guards. *Children's Hospital of Michigan*, 299 NLRB 430, *enfd in relevant part*, 6 F.3d 1147 (6th Cir. 1993). Because "individuals working for States or political subdivisions are not 'employees' [as defined in Sections 2(3) and 2(2) of the Act], it follows that if a union represents such individuals, it does not represent 'employees other than guards' under Section 9(b)(3), and thus may represent guards under that provision." *Children's Hospital of Michigan*, 299 NLRB at 430; *see Guardian Armored Assets, LLC*, 337 NLRB 556 (2002); *see also University of Tulsa*, 304 NLRB 773 (1991)(moonlighting municipal police officers serving as part-time guards were included in a unit of guards).

Further, the "theoretical chance that a non-guard employee could join a guard union where, for example, a union constitution might be interpreted as permitting non-guards to become members, is insufficient to deny certification to such a union." *Elite*

Protective & Security Services, Inc., 300 NLRB 832 (1990); *see J.W. Mays, Inc.*, 675 F.2d 442, 444 (2d Cir. 1982), *enfg* 253 NLRB 717 (1980).

In the instant case, the Employer contends that there "can be no question [that the Petitioner's] Constitution and By-Laws clearly allow for membership or associate membership for all employees, including those employed in non-guard positions in the private sector."[4] There is no basis in the record for such a contention. Rather, the Petitioner's constitution and by-laws provide that a full member must be a "full or part-time member of a public or private law enforcement entity for whom the [Petitioner] is the recognized employee bargaining representative. Full members shall have voting rights in [the Petitioner's] elections and bargaining agreements." Wynder's testimony makes clear that the Petitioner's definition of a "member of a private law enforcement entity" is the same as the Act's definition of a guard. As for associate members, the constitution and by-laws provide that an associate member must be a "full or part-time member of a public or private law enforcement entity for whom the [Petitioner] is not the recognized employee bargaining representative. Associate members shall not have any voting rights in [the Petitioner's] elections but they will be entitled to participate, at their own expense, in Association sponsored health, dental and vision plans."

Further, the Employer's argument is based on speculation. That the Petitioner's constitution may permit, at some time in the future, non-guards to be members, is clearly an insufficient basis to deny the Petitioner's right to seek 9(a) status in a pure guard unit when no such conflict currently exists. There is no evidence that the Petitioner is seeking to represent non-guards who are employees as defined by the Act, or that the Petitioner has ever admitted to membership a non-guard who is an employee as defined by the Act.

[4] Brief of Employer at 10.

Outside Employment of Petitioner's Officers

Wynder testified that he is currently employed as the head of security for the New York Mets, and that the petitioner's vice president is retired. Another officer is the supervisor of security at Bloomberg Associates, and a fourth officer is employed by the DEP. Thus, none of these officers is an employee as defined by the Act, and their outside jobs do not implicate Section 9(b)(3) of the Act.

Moreover, even if a guard union's own employees or officers are non-guard employees, as well as being members of the union, Section 9(b)(3) does not prohibit the union from representing guards. *Sentry Investigation Corp*., 194 NLRB 1074, 1075 (1972)(employment of four members as non-guards did not disqualify union from representing guards); *J.W. Mays, Inc.,* 675 F.2d at 444 (the fact that one of the three officers/members of a guard union was working part-time in a non-guard capacity was properly disregarded by the Board). Although "Section 9(b)(3) may literally be read to disqualify" a union from representing guards if it "accepts non-guard employees as members, the purpose of the statutory provision is to prevent a guard union…from bargaining on behalf of non-guard members." *Sentry Investigation*, 194 NLRB at 1075. Since a union cannot be certified as a bargaining representative for its own employees, a union's employment of non-guard "employees of its own who [are] also members …[has] no bearing on its qualifications to act for guards employed by other employers." *Sentry Investigation*, 194 NLRB at 1075.

The Employer argues that Wynder's employment with the New York Mets raises the "potential for conflict of loyalties," citing *Wells Fargo Armored Service Corporation*,

270 NLRB 787 (1984).[5] However, the Employer's reliance on *Wells Fargo* is misplaced. In *Wells Fargo*, the Board held that it was permissible for an employer that voluntarily recognized a mixed guard and non-guard union to "end that voluntary relationship," after the expiration of a collective bargaining agreement. *Wells Fargo*, 270 NLRB at 787. Since the Board could not certify a mixed union, pursuant to Section 9(b)(3), the Board concluded that it could not issue an order requiring an employer to bargain with a mixed union, as such an order would be tantamount to a certification. *Wells Fargo*, 270 NLRB at 787-88. Thus, *Wells Fargo* has no relevance to the outside employment of union officials, or any other issue raised by the instant case.

Alleged Affiliation with Local 300

The record evidence indicates that after the Petitioner was certified to represent the EPOs, the City of New York continued to deduct dues from their paychecks, which were inadvertently forwarded to Local 300 instead of Petitioner. The error was corrected several months later, and Local 300 was required to remit to the Petitioner the dues Local 300 received since the time of its decertification. In addition, pending the negotiation of a new contract by the Petitioner, the EPOs are continuing to receive some of the contractual benefits they received when they were represented by Local 300. The Employer relies on this evidence in asserting that the Petitioner is either directly or indirectly affiliated with Local 300.

A guard union "is 'affiliated indirectly' with a non-guard union, within the meaning of Section 9(b)(3) of the Act, where 'the extent and duration of [the guard union's] dependence upon [the non-guard union] indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.'"

[5] Brief of Employer at 10.

Wells Fargo Guard Services Division of Baker Protective Services, Inc., 236 NLRB 1196, 1197 (1978); *see J.W. Mays, Inc.*, 675 F.2d at 444; *Sentry Investigation Corp*., 198 NLRB 1074, 1075 (1972). However, even if a non-guard union's assistance exceeds the restrictions imposed by Section 9(b)(3), "the Board historically has 'refused to find indirect affiliation where, on the record, it appeared that the assistance and advice once received by the guard union from the non-guard union had, in fact, terminated." *U.S. Corrections Corporation*, 325 NLRB 375 (1998); *see Wackenhut Corp.*, 178 F.3d 543 (D.C. Cir. 1999).

In the instant case, the facts relied on by the Employer in arguing that the Petitioner is affiliated with Local 300 do not amount to the type of "affiliation" contemplated by Section 9(b)(3) of the Act. The record reflects that the Petitioner has never attempted to affiliate with any other labor organization, and has never received assistance from any other labor organization. The Petitioner's Board of Directors stipulated at a meeting that it will not affiliate with the AFL-CIO.

In this regard, the cases cited in the Employer's brief are factually inapposite.[6] For example, *In the Matter of Schenley Distillers, Inc.*, 77 NLRB 468, 469 (1948) involved a guard union affiliated with the AFL, a factor that is not present in the instant case. In *Armored Transport of California, Inc*., 269 NLRB 683 (1984), also relied on by the Employer, the Petitioners were two business agents for a non-guard union, who sought to represent guards during their free time while continuing to work for the non-guard union, demonstrating that they would not be sufficiently independent of the non-guard union to represent guards. By contrast, in the instant case, the Petitioner's agents

[6] Brief of Employer at 7-8.

are not employed by Local 300. The Employer also cites *International Harvester Company*, 145 NLRB 1747 (1964), in which a union seeking to represent guards "continued to accept substantial financial aid from the non-guard union…continued to permit the non-guard union to participate in its affairs…continued to permit the non-guard union to act as its negotiator, to organize and conduct its strike, and to set the terms for the settlement of the strike." *International Harvester*, 145 NLRB at 1749-50. On these facts, the Board concluded that the, "Petitioner is not presently free to formulate its own policies and decide its own course of action, with the complete independence from control by the nonguard union which the Act requires." *International Harvester*, 145 NLRB at 1750. None of these factors are present in the instant case.

Based on the analysis set forth above, I have concluded that the Employer has failed to provide "definitive evidence" of the Petitioner's noncertifiability as a bargaining representative for guards. *See Burns Security Services*, 278 NLRB 565, 568 (1986). Accordingly, I will direct an election in the unit sought by the Petitioner.

CONCLUSIONS AND FINDINGS

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed. [7]

2. The parties stipulated that Brink's U.S., herein called the Employer, a domestic corporation with its principal place of business located at 555 Dividend Drive, Copell, Texas, New York, and facilities located at 652 Kent Avenue, Brooklyn, New York, and 481-495 New Jersey Railroad Avenue, Newark, New Jersey, is engaged in transporting, protecting and processing currencies and other valuables. During the past

[7] The Hearing Officer properly precluded both parties from providing evidence that was irrelevant, outside the witness's knowledge, or otherwise inadmissible. The Employer's contention that it was prejudiced by the Hearing Officer's rulings, repeated throughout the Employer's brief, is without merit.

year, which period is representative of its annual operations generally, the Employer, in the course of its business operations, purchased and received at its Brooklyn, New York facility, supplies and materials valued in excess of $50,000, directly from entities located outside the State of New York.

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute two units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> (1) All full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by the Employer at its 652 Kent Avenue, Brooklyn, New York facility, but excluding all other employees and supervisors as defined in the Act.
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> (2) All full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by the Employer at its 481-495 New Jersey Railroad Avenue, Newark, New Jersey, facility, but excluding all other employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time(s) and place(s) set forth in the

notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by Law Enforcement Employees Benevolent Association.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon*

Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility lists, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned, who shall make the lists available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such lists must be received in the Regional Office, One MetroTech Center North-10th Floor, Brooklyn, New York 11201 on or before **February 28, 2006**. No extension of time to file the lists may be granted, nor shall the filing of a request for review operate to stay the filing of such lists except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notices of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. The Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employers to comply with these posting rules shall be grounds for setting aside the elections whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 7, 2006.** The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: February 21, 2006, Brooklyn, New York.

ALVIN BLYER

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